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CRITIQUES OF MARRIAGE AN ESSENTIALLY UNJUST INSTITUTION?

Histories of marriage document its role in oppressing women, gays and lesbians, and racial and religious minorities.¹ Critics argue that marriage is essentially patriarchal, heteronormative, harmful, and an ownership relation, and that reform cannot excise its oppressive nature. Is marriage unjust in itself or has it only been contingently unjust?

Feminists disagree among themselves over marriage reform. Some argue for the abolition of what they see as an essentially unjust institution. But others argue that marriage law protects women and recognizes the significance of noncontractual, interdependent relationships. Likewise with theorists of gay and lesbian oppression: Some argue that marriage is essentially heteronormative, others that same-sex marriage rights will empower gays and lesbians and counteract social stigma against same-sex relationships.

Controversies over marriage are not merely academic. The U.S. Federal Government promotes “traditional” marriage. In the 2008 U.S. elections, three state bans on same-sex marriage were passed, and Arkansas banned anyone “cohabiting outside a valid marriage”—including male-female partners—from adopting or fostering children (despite the fact that the state had only a quarter of the foster parents needed for children in state custody).² In Canada, same-sex marriage was legally recognized nationally in 2005, and the Supreme Court is currently deliberating on whether polygamy should follow. A Marriage Boycott movement calls on couples to abstain from marriage until all couples can marry, the Alternatives to Marriage Project fights discrimination against the unmarried, and the idea of abolition has been aired in the *New York Times*.³ Possibilities for legal reform are various, and in

assessing them, the question of whether marriage can be liberated from its history of oppression is key.

The criticisms I survey in this chapter are crucial to my argument for marriage reform in two ways. The fact that there are competing ethical views over the meaning and value of marriage implies that the liberal state should deal evenhandedly with the various competitors. However, these critiques also suggest that marriage law sustains, and has sustained, unjust systematic discrimination. If these claims are correct, marriage law reform becomes a matter of equal opportunity and rectification, due to its contingent injustices. But I argue that marriage is contingently, not essentially, unjust, and so a just reform is possible.

I. FEMINIST CRITIQUE

Many feminists argue that marriage contributes to the systematic oppression of women. In the United States into the 1970s, marriage deprived wives of full human rights. Under the doctrine of coverture, adopted in the United States from English common law, a wife's legal personality was erased on marriage. As Sir William Blackstone explained in his eighteenth-century *Commentaries on the Laws of England*: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."⁴ Caroline Norton, in 1855, listed the effects of marriage on wives:

A married woman in England has *no legal existence*: her being is absorbed in that of her husband. Years of separation or desertion cannot alter this position....She has no possessions, unless by special settlement; her property is *his* property....An English wife has no legal right even to her clothes or ornaments....An English wife cannot make a will...cannot legally claim her own earnings...may not leave her husband's house. Not only can he sue her for "restitution of conjugal rights," but he has a right to enter the house of any friend or relation with whom she may take refuge...and carry her away by force, with or without the aid of police....She cannot prosecute for a libel...cannot sign a lease, or transact responsible business...cannot claim support, as a matter of personal right, from her husband....She cannot bind her husband by any agreement....As *her husband*, he has a right to all that is hers; as *his wife*, she has no right to anything that is his.⁵

Coverture deprived women of full legal rights and left married women virtually powerless. Spousal abuse was either explicitly permitted (U.S. and English law allowed

husbands to discipline their wives physically), or ignored by authorities. Because wives were seen as having given their husbands rights to sexual access and their bodies were viewed as their husbands' to use, marital rape was deemed legally impossible, and hence, not a crime. John Stuart Mill in *The Subjection of Women* compared wives' legal position under coverture to that of slaves, with the difference that wives were intimate with their "masters," whom they were internally motivated to please by ideological teachings about duty and by love and desire.⁶

Although coverture was dismantled in England and the United States during the nineteenth century, elements lingered in law. Spousal rape was not made a crime in all fifty U.S. states until 1993, and as of 1996, twenty-three state criminal codes mitigated charges or exempted spouses (and, in some cases, cohabitants) from ordinary sexual battery and assault laws.⁷ Until the second half of the twentieth century, legal roles within marriage were defined on the basis of views about women's inferiority. Spouses could not alter legally imposed gendered duties—for the husband, financial support and decision-making power, for the wife, domestic and child care duties—entailing that wives were not entitled to their earnings for any work done in the home, including work such as taking in laundry, because their husbands owned their domestic labor.⁸ Twentieth-century American courts struck down contracts between husband and wife regarding income and support: A contract between spouses "was regarded as an impossibility... because husband and wife were considered to be a single entity."⁹ Spouses are still, today, exempt from U.S. labor law protections within marriage, despite the fact that they may work for one another. And in Britain, the social security system and divorce law assumed wives' roles as mothers and homemakers: The "one-third rule," allocating one-third of marital property to the wife on divorce, was defended by Lord Denning in 1973 on the grounds that the husband would bear greater expenses, since he "must get some woman to look after the house—either a wife... or a housekeeper."¹⁰

Legislatures also imposed gendered standards known as "head and master laws." As late as 1970, the Ohio Supreme Court declared that a wife was "at most a superior servant to her husband... only chattel with no personality, no property, and no legally recognized feelings or rights," and a 1974 Georgia statute defined the husband as "head of the family" and the wife as "subject to him; her legal existence... merged in the husband."¹¹ Until the 1960s, married women's legal domestic obligations were explicitly given as rationale for their exclusion from some private- and public-sector employment and education.¹² Until the 1970s, husbands could determine domicile and be required to give consent for their wives' loan or credit card applications.

Twentieth-century radical feminism—echoing Mill, who thought coverture had anciently originated in force—saw marriage as emerging from violent beginnings: "Marriage as an institution developed from rape as a practice.... Marriage meant the

taking was to extend in time, to be not only use of but possession of, or ownership.”¹³ While modern marriage was claimed to protect women by assigning support obligations to husbands, this “propaganda” covered up the fact that it was a form of “slavery,” in which wives were legally obligated to live with and have sex with their husbands and perform unpaid domestic labor. This legal condition resembled slavery (again, as Mill had argued): “[T]he master is entitled to free use of the slave’s labor, to deny the slave his human right to freedom of movement and control over his own body.”¹⁴ In this passage, Sheila Cronan refers to contemporaneous wives’ lack of legal rights against spousal rape and sexual battery, as well as laws requiring spouses to cohabit in some states. Until recently, and in some jurisdictions still, wives lacked full legal protection of their bodily integrity, a basic human right.

Wives’ legal status has changed considerably and much for the better. But marriage continues to perpetuate elements of women’s oppression, understood as the diminishment of their life opportunities through the interaction of systematic legal, social, and economic forces. The signal problems are spousal violence and economic dependence derived from gendered spousal roles.

Spousal rape and abuse are epidemic in marriage and intimate partnerships. Two U.S. studies found rates of rape occurring at some point during a marriage was between 10 and 14 percent; in 2000, the U.S. Department of Justice National Violence Against Women Survey found that 7.7 percent of women surveyed reported rape by an intimate partner during their lifetime.¹⁵ According to this survey, “Intimate partner violence is pervasive in U.S. society: nearly 25 percent of surveyed women and 7.6 percent of surveyed men said they were raped and/or physically assaulted by a current or former spouses, cohabiting partner, or date at some time in their lifetime.”¹⁶ According to the U.S. Department of Justice Family Violence Statistics, of the “roughly 3.5 million violent crimes committed against family members during 1998 to 2000 . . . 48.9 percent were crimes against a spouse.” Eighty-four percent of victims of spousal abuse were female.¹⁷ Myths surrounding marital rape continue to influence prosecution and make recovery difficult.¹⁸ Intimate violence is also prevalent among unmarried cohabitants, reportedly at even higher rates; the National Violence against Women Survey findings “support previous research that shows unmarried couples are at greater risk of intimate partner violence than married couples.”¹⁹

Violence against women contributes to women’s oppression directly, through the harm to individual victims, and indirectly, by contributing to a culture of fear in which such violence is taken as normal or expected. This culture affects uncoupled as well as coupled women, inhibiting women’s perceived freedom to walk alone at night or burdening the choice to stay in a relationship with a perceived male protector. To the extent that marriage enables a culture of violence against women, it contributes to women’s oppression. But what is the link between marriage and violence?

The majority of marriages, of course, are not abusive, and as noted, abuse occurs at even higher rates in unmarried cohabitation. Correlation should not be confused with causation; just because abuse occurs within marriages does not show marriage causes it. Feminist theory diverges on explanations of male violence: violent pornography and the pornographic objectification of women; innate male aggressiveness, explained by evolutionary biology; a culture that valorizes war and violence in activities such as sports; male psychological resentment of women stemming from infant dependence on female caregivers or the repression of the sexual instinct; a misogynistic culture; or some combination of these with women's social and economic powerlessness, which facilitates abuse. The question is how far marriage enables abuse by contributing to women's vulnerability, and whether it inherently does so.

Critics of marriage point out that marital legal access rights to common property, or laws mitigating penalties for sexual assault within marriage, facilitate abuse.²⁰ Certainly, laws mitigating sexual battery or permitting abusers to access shared property can (and should) be excised, and expedited procedures to protect victims of violence can be devised. Legal rights facilitating abuse are not inherent to marriage; access rights, rather, follow from shared property ownership or domicile. What may appear to be inherent to marriage, however, is the kind of relationship in which abuse occurs. "Intimate violence" against women by men (and between same-sex partners, and sometimes against men by women) occurs in intimate, dyadic, exclusive relationships that provide conditions for abuse by hiding the couple in a materially and socially private sphere. Women have many incentives to enter and remain in such relationships. Current marriage law provides economic and legal incentives to enter and stay, and social pressure and economic dependency add to these. Thus, marriage may facilitate abuse by making exit difficult and by promoting exclusive dyadic relationships.

Legal structures shape our choices by shaping our default expectations, and—in the case of marriage—endorsing and incentivizing certain choices. Legal recognition of exclusive dyads, and only exclusive dyads, underwrites amatonormative social pressures. If alternatives to exclusive, intimate relationships with men were more salient and equally supported, women's power to leave exclusive dyadic relationships, or choose others in the first place, would be correspondingly increased. Abolishing marriage is one way to remove the state's *imprimatur* on it. But there is a way to increase choices even more: by recognizing and supporting a range of relationships, including networks or friendships, thereby—indirectly—creating new social scripts and making alternative relationships salient.

However, there is strong evidence that exit-burdening economic dependence, rather than legal or social pressure, is the major factor in facilitating abuse and spousal rape. A landmark study of rape in marriage found that "90 percent of wives who

stayed with their husbands following a rape depended on the husband for money, whereas only 24 percent of those who left faced this financial constraint.... 100 percent of those women who were the sole providers for their households at the time of the rape left their husbands following the act.”²¹ Addressing the contribution marriage makes to violence requires addressing economic dependence.

Women’s economic dependence in marriage, and the associated difficulty of exit, is the second way in which marriage perpetuates women’s oppression. Marriage is associated with a gendered division of labor, which contributes to economic dependency, leading to power inequality. Okin documented a vicious cycle of wives’ economic dependency, which she called “vulnerability by marriage.” Most married women work outside the home, but many work part-time or sacrifice career opportunities to support their husbands’ careers or to give more energy to domestic responsibilities. Even women who work full-time outside the home face a “second shift” of housework, which affects their workplace competitiveness—they have less energy and time to work on projects at home or simply rest. The more women’s earning opportunities and workplace competitiveness shrink, as they spend time away from the workforce or work part-time or low-paid jobs, the more rational it seems to deprioritize their paid work to support the higher-paid husband’s career. The resulting earning gaps can make women economically dependent on their husbands to maintain their standard of living. This sketch should be complicated slightly: According to Anne Alstott, the larger gap in earnings is not between married and unmarried women, but women with and without children. However, the gap between men and women is significant: Women’s overall earnings in 2010 were only 81.2 percent of men’s earnings.²² Economic inequality between spouses produces power inequality. Decision-making power within marriage is tied to earning power, because for the economically dependent, divorce is a difficult option.²³

The gendered division of labor in marriage has psychological and physical costs for women in addition to economic costs. Susan Maushart calls “the myriad tasks of physical and emotional nurture” expected of married women “wifework.” Wifework consists not only in child care and the “second shift” of domestic labor, but attending to a husband’s emotional and sexual needs, his health, nutrition, scheduling, laundry, wardrobe, social life, sending cards on his behalf and reminding him of birthdays, paying attention to him, and even laughing at his jokes: “Wifework includes what Virginia Woolf called ‘reflecting a man at twice his normal size.’”²⁴

Maushart argues that wifework accounts for emotional and psychological (as well as economic and physical) hazards of marriage for women. Men, it is widely reported, benefit psychologically from marriage. According to Maushart, women do not: “Wives report levels of depression two to three times higher than unmarried women, and, if they are unhappily married, three times higher than that of their husbands.”

Married women, compared with single women, suffer “more nervous breakdowns, inertia, loneliness, unhappiness with their looks; more insomnia, heart palpitations, nervousness, and nightmares; more phobias; more feelings of incompetence, guilt, shame, and low self-esteem.”²⁵

Just as spousal violence contributes to a wider culture of violence against women, affecting unmarried women, the effects of gendered spousal roles extend to unmarried women too. A long tradition of feminist criticism examines the effects of the pursuit of romantic love and marriage on women’s aspirations. Simone de Beauvoir wrote that marriage “is the destiny traditionally offered to women by society,” leading women to focus on capturing a husband rather than pouring their energies into other—more creative and rewarding—vocations.²⁶ Similarly, Okin argued that the cycle of vulnerability by marriage begins long before marriage, as social pressures surrounding marriage and romantic love make women economically “vulnerable by anticipation” of marriage. A society which teaches girls that their highest purpose is to be wives and mothers, that the demands of wifework will squeeze out other roles, and that a good husband will be an economic provider, constrains women’s ambitions and self-conceptions.

Such pressures are by no means obsolete. In U.S. public schools, abstinence education promotes a “marriage message,” one which is, in some curricula, gendered. Congressman Henry Waxman’s investigation into federally funded abstinence education curricula found that some “treat stereotypes about girls and boys as scientific fact. One curriculum teaches that women need ‘financial support,’ while men need ‘admiration.’ Another instructs: ‘Women gauge their happiness and judge their success on their relationships. Men’s happiness and success hinge on their accomplishments.’” Some curricula reinforce the gendered division of labor, teaching that men need “domestic support,” and some reinforce the belief that adult women need male protection: “The father gives the bride to the groom because he is the one man who has had the responsibility of protecting her throughout her life. He is now giving his daughter to the only other man who will take over this protective role.”²⁷

In the last chapter, I argued that amatonormativity is oppressive because it penalizes singles and friends and reduces their opportunities to pursue their relationships. Amatonormativity also contributes to women’s oppression. The wedding-industrial complex broadcasts amatonormative promarriage propaganda through books, magazines, movies, and advertising, targeting females from young girls to mature “career women.” This media bombardment fuels women’s vulnerability by anticipation of marriage by intensifying pressures to marry, and, even worse, obscuring the unglamorous side of marriage and its costs. This does women the disservice of drawing attention to the wedding itself and away from the more significant long-term concerns of wifework and the need to be self-supporting if the marriage deteriorates.

Within a society structured by gender roles that limit women's life chances relative to men's, the desire for romantic love and marriage may lead women to make disadvantageous life choices. It is not that interpersonal relationships are not valuable. But the amatonormativity of contemporary North American society—hot-housed by the wedding-industrial complex and popular entertainment—sells love and marriage as a valuable commodity for which women are willing to trade more basic goods. Men may be encouraged to trade a month's salary for a diamond ring, but society encourages women to make sacrifices with much steeper long-term costs: putting their husband's career first, downgrading their career expectations, choosing less well-paid part-time work. These choices lead to gaps in earnings and power within marriages, and children learn gender roles, perpetuating patterns of gender inequality in the next generation. Given current gender roles, amatonormativity has a disparate impact on women.

Gendered spousal roles are maintained today through social pressures and expectations rather than through legal prescription. Marriage does not legally require that wives take on gendered homemaker roles. But in considering how the state has structured the background expectations that shape our lives, it should give us pause that it did so require well into the twentieth century and that such roles are still being taught in some public schools. Marriage is still associated with gendered role expectations. But once again, abolishing marriage does not seem to be the only, or best, way to address this. Rather than placing marriage into the private sphere, legally removing gender from marriage—by recognizing same-sex marriage, where it is not already recognized—and removing the amatonormative structure of marriage may use law to combat gendered expectations.

This approach is controversial. Feminists disagree on whether reform or abolition of marriage will best serve women. Some feminists, like Cronan and Claudia Card, have called for abolishing marriage to weaken social pressures to marry and to weaken gendered spousal role expectations, but others argue that reform can serve these purposes. Ann Ferguson has argued that recognizing same-sex marriage will help undermine belief in gender difference (as well as gendered spousal roles), because marriage is the primary institution that supports such beliefs. I argue, below, that the symbolism of marriage can be altered to undermine the heteronormative and patriarchal social pressures it has previously supported.

Another question concerns how property division on divorce, and its reform, affects women. Okin and Mary Lyndon Shanley have argued that marriage is an important legal tool to protect the vulnerable; recognizing gender-structured marriage is necessary to compensate for inequities arising from it. Thus, legal recognition of marriage is necessitated by justice until a truly gender-neutral society is achieved.²⁸ Okin, for instance, proposes that, to recognize the value of unpaid house-work, all wages be

equally held by the wage-earner and the unpaid homemaker. She also proposes that divorce law correct inequities arising from gender roles, ensuring that both parties have the same standard of living and that alimony lasts as long as the domestic labor did. These reforms address the inequities of gender-structured marriage, but they do not address social pressures and gender roles leading to the unequal division of domestic labor. Such legislation presents a dilemma, because by recognizing unequal marriages in order to protect the vulnerable, it may actually encourage women to become dependent. These questions are vital to the issue of exit from abusive marriages as well, since alimony protections give women greater power to leave; these issues are addressed in Chapter 8. Marriage reform requires good exit strategies.

Marriage presents two interrelated problems for women. It creates economic dependence, which reduces women's power and facilitates abuse, and it sustains gendered roles and amatonormative social pressures. A marriage law that is not gendered or amatonormative, recognizing a wide range of relationships, may help to address gendered spousal roles as well as giving women better alternatives. However, it might be objected that marriage, with its patriarchal symbolism, cannot be detached from hierarchical gender roles.

It might be thought that marriage, betraying origins in force, is essentially an ownership relation, in which men own women. Thus, any marriage law is inherently patriarchal. However, it is difficult to see why a reformed law of marriage can never escape its historical origins in patriarchal force. Let us consider one such genealogical critique of marriage and contract. Carole Pateman has argued that the contracting agent is inherently and tacitly defined as male, and that "[c]ontract... is... the mainstay of patriarchy."²⁹ In her reconstruction of the social contract tradition, women were excluded from the social contract by an earlier, sexual, contract, in which men agreed to confine women to marriage and the private sphere. The marriage contract, creating the private and subordinating women to men, is, in her view, the origin of modern patriarchy. Because the sexual contract is fundamental, and excludes women, contract is defined in terms of sex difference: The contracting individual in the social contract tradition is conceived as male, and maleness is conceived as possessing power over a woman, through marriage. However, while Pateman accurately accuses the social contract tradition of sexism, contracts, as state-enforced bargains between different self-interested individuals, do not necessarily presuppose male contractors. While it is true that married women were banned from contracting under coverture, this was remedied by enabling them to make contracts. Indeed, it is difficult to see what alternative remedy there could have been to the unjust exclusion of wives from making contracts—abolishing contract itself? A contract is a legally defined tool, which can be employed in a gender-neutral way and can serve women's interests when law allows them access to it.

Similarly, marriage is not essentially an ownership relation; its legal terms can be, and have been, redefined. Theorists who view marriage as essentially patriarchal point to its history and continuing morally laden and gendered meaning. However, citizenship provides a good analogy. When citizenship was held only by white males, it was contingently racist and sexist. In U.S. law, for instance, the citizen historically was defined as a male husband and head of family (as Pateman argues the contractor was), and law broadly reflected this assumption.³⁰ But citizenship has been redefined. The history of marriage is undoubtedly patriarchal; but it, too, can be redefined in law. Of course, this does not give sufficient reason for retaining marriage rather than abolishing it—there are alternatives, such as civil union. In the following chapters, I continue to develop a case for minimizing, rather than abolishing, marriage.

II. SAME-SEX MARRIAGE, THE “MONOGAMY STRAIGHTJACKET,” AND FREE LOVE

The comparative merits of abolition and reform are also the subject of debate among theorists of gay and lesbian oppression. Some defenses of same-sex marriage have focused on the value of chaste, exclusive, sexual dyads. For example, Stephen Macedo defended same-sex marriage on the grounds that, by discouraging promiscuity, it would encourage gays and lesbians to lead better lives.³¹ In contrast to such sexually conservative arguments, some theorists of lesbian, gay, and bisexual oppression have rejected same-sex marriage altogether, arguing that the marital ideal is a heterosexual paradigm. Gays and lesbians have often chosen less possessive and insular, more flexible and open, relationships. Thus Paula Ettelbrick asks, “Since when is marriage a path to liberation?” She argues that instead of affirming difference, same-sex marriage would assimilate lesbian and gay relationships into the heterosexual model—the “monogamy straightjacket,” in Claudia Card’s phrase.³² According to Ettelbrick, same-sex marriage would undermine the goals of gay liberation: affirming gay and lesbian identity and relationship diversity.

Marriage, by legally distinguishing legitimate and illegitimate relationships, wrongly discourages relationship diversity; it encourages only one kind. Card compares the legal recognition of marriage to the defunct practice of marking birth certificates as “legitimate” or “illegitimate.”³³ Relationships, like infants, should not be subjected to such legal distinctions. To Ettelbrick and Card, this classification is in itself an unjust discrimination, and it also serves as the basis for further unjust discrimination between the married and the unmarried. Card compares the gay and lesbian fight for same-sex marriage to a demand by a group excluded from slave-owning for the right to own slaves. She argues that the legal and economic incentives of marriage are inherently unjust, for a number of reasons. First, as discussed

in the last section, the benefits attached to marriage and the difficulty of divorce burden the choice to marry or stay married with extraneous considerations. The reduction of exit options facilitates abuse and violence, as do spouses' legal access rights to each others' bodies and homes. Because these features enable abuse, marriage, according to Card, is an evil, insofar as it "facilitates...reasonably foreseeable intolerable harm"; same-sex marriage is undesirable because it would lead to abuse and avoidable deaths.³⁴ This evil, however, is not, as I argued above, inherent to marriage. Legal access rights and provisions mitigating spousal violence can be removed from marriage law. In addition, marriage reform responsive to the threat of violence can ensure adequate exit options, in light of economic dependence and dependence on marriage for benefits such as health care; I postpone this topic to Chapter 8.

Second, Card argues that distributing benefits such as health care through marriage is unjust because health care is a universal entitlement, which should not depend on marital status. This raises the question of whether legal distinctions and entitlements on the basis of marriage can be justified. Same-sex marriage advocates have argued that extending benefits such as health care and pension rights, custody and inheritance rights, tax and immigration status, and legal recognition of intimate relationships will benefit lesbians and gays. Even if excluding the unmarried from some of these goods is unjust, the exclusion of all gays and lesbians is a further injustice. Extending these benefits through same-sex marriage will combat lesbian and gay oppression and move closer to the goal of universal health care and pensions.³⁵ In an unjust system, one reform may not alleviate all injustices; but doing nothing, or abolishing marriage without implementing universal health care and pensions, would also result in injustice, and result in more people being deprived of health care and pensions.

However, even if providing such benefits through marriage can somehow be justified politically, will their provision through marriage serve gay liberation or force gay assimilation into the heteronormative mainstream? Some same-sex marriage advocates have argued that marriage would counteract stigmas against lesbians, gays, and bisexuals, thereby making society more accepting of diversity and the mainstream less heteronormative.³⁶ But can marriage law symbolize that same-sex lovers have equal worth, without also symbolically implying that some relationships are more valuable than others? By Card's and Ettelbrick's reasoning, same-sex marriage does not even symbolically express the equal worth of gays and lesbians; it fails to treat gays and lesbians equally because it fails to recognize their different modes of relationship. Admitting gays and lesbians into a heteronormative institution of marriage does not treat gays and lesbians equally. But Richard Mohr points out that same-sex marriage and relationship diversity are not incompatible: Marriage need not entail

monogamy. Indeed, same-sex marriage may teach different-sex spouses that neither unchosen gender roles nor monogamy are essential to marriage.³⁷

Card and Ettelbrick criticize the classification of relationships as “legitimate” and “illegitimate.” However, it is precisely because marriage confers legitimacy that same-sex marriage is seen as an important symbolic goal for gay rights activists. Excluding gays and lesbians from marriage, they argue, is one of the primary ways in which society marks them as inferior. Thus Mohr argues that society denies gays and lesbians dignity by excluding them from marriage. The offer of “civil unions” replicates this inferiority—it “serves...to degrade gay men and lesbians by denying them one of the chief social forms by access to which America marks out membership in full humanity.”³⁸ Card, too—who argues for abolishing all marriage—has more recently conceded the symbolic importance of same-sex marriage so long as different-sex marriage exists: Her opposition to same-sex marriage does not entail endorsing legislation banning it, such as the Defense of Marriage Act. She compares such legislation to the Nuremberg laws prohibiting intermarriage between Germans and non-Germans, suggesting that marriage bars may pave the way for other forms of legal discrimination.

Developing a theory of gay and lesbian oppression as distinct from other forms of oppression, Cheshire Calhoun has argued that marriage bars play a crucial role in the distinctive feature of such oppression, displacement from public life. The right to marry is at the heart of concepts of good citizenship: “[B]eing fit for marriage is intimately bound up with our cultural conception of what it means to be a citizen...because marriage is culturally conceived as playing a uniquely foundational role in sustaining civil society.”³⁹ Excluding gays and lesbians from this institution displaces them from the center of political life and from status as full and equal citizens. Same-sex marriage is, on this view, essential to gay liberation.

However, Card’s and Ettelbrick’s point could be reformulated: Marriage may indeed be seen as a criterion for full citizenship, but wrongly so. Indeed, on this criterion, all unmarried persons, the divorced, and polygamists also fail to realize their capacities for citizenship. Citizens should not be graded on their marital status, or relationships on their supposed legitimacy. What is needed is not an extension of marriage but a transformation of the national imagination. The fundamental questions are whether marriage relationships can be recognized without quelling diversity, and whether any relationships deserve state support. In Chapter 7, I argue that there is political justification for state support for caring relationships. As I argue, Card is correct in rejecting state legitimization of relationships; where relationships between adults are concerned the only markers of legitimacy, from the state’s perspective, should be mutual consent and compatibility with justice. But support for some relationships can be distinguished from classifying relationships into

legitimate and illegitimate; the practical difference depends on clarifying the reasons for supporting them.

To foreshadow, one reason for reforming, rather than abolishing, marriage is that state definition of marriage will allow public rectification of past injustices. Abolishing marriage might seem to achieve equality by placing everyone in the same legal position. However, this would cede control of this still socially powerful institution to the churches and other private-sector groups. Abolition would allow private-sector providers to deny entry, with no countervailing public message of equality whereas reform would send an unequivocal message of equality. Ensuring equal access to a broadly recognized institution of marriage requires state involvement.

Just as Calhoun and Mohr argue that same-sex marriage will combat discrimination against gays and lesbians, some feminists have argued that same-sex marriage will combat gender roles. The critics' worry is that same-sex marriage will simply extend eligibility for patriarchal gender-structured marriage. But it is difficult to see how a marriage without gender difference can be inherently gender-structured. In itself, as Ferguson argues, "gay marriage *does* undermine the traditional patriarchal model" because different-sex marriage is the primary support of belief in naturally given gender roles.⁴⁰ The possibility of marriage without gender difference opens the possibility, for everyone, of marriage without gendered spousal roles. Criticism of marriage as inherently patriarchal or heteronormative suggests a false choice between superficial reform and abolition. Just as past marriage reform has ended women's legal subordination and race-based marriage bars, a restructured institution of marriage could challenge "the monogamy straightjacket" by recognizing diverse relationships, and thereby avoiding amatonormativity and heteronormativity.

A final aspect of Card's argument against marriage recalls the nineteenth-century free love tradition. Card suggests that the economic and legal incentives to marry burden the choice with extraneous considerations and make it unfree. This reflects a justice-related concern about burdening exit, but it may also reflect skepticism about institutionalizing love with legal obligations, and letting economic or practical considerations affect decisions about love, sex, and relationships.

Free lover and anarchist Emma Goldman wrote, "Every love relation should by its very nature remain an absolutely private affair. Neither the State, the Church, morality, or people should meddle with it."⁴¹ But this should be considered in light of the twentieth-century feminist insight that the personal is political. We are taught how to love and the proper objects of love by social pressures and the state. Material conditions, determining where we can meet and where we can be alone, constrain love. In modern society, the state is always already involved. State noninterference would simply shift the construction of love wholly to cultural, social, corporate, and religious pressures. Love would be shaped by the machinations of the market and the

mass media. Rather than withdrawing from protecting love relationships, the state could respect their “privacy” by providing a variety of options to support them. It is constraint on choice that constitutes “meddling”; supporting an array of relationships would not constrain, but empower, choice, and supporting all caring relationships would provide a strong counterbalance to the romantic-love-obsessed mass media and consumer culture.

A second free love worry is that love and sex should not be contaminated with economic or other material concerns. As the phrase “free love” suggests, a key idea of the movement was that the spontaneous character of love meant it could only be given freely, without compulsion or obligation. Stephen Pearl Andrews argued against marriage on the grounds that sexual relations were debased, like prostitution, by its legal bond. Free love must be authentic and spontaneous, given without thought of duty or benefit; Andrews defined adultery (drawing on its connotation of immoral sex) as any “sexual union, induced by any other motive . . . than that mutual love which by nature prompts the amative conjunction of the sexes.”⁴²

However, it is either naive or disingenuous to suggest that practical considerations should not shape decisions about love and sex. For one thing, the success of relationships may depend on material conditions, and for another, people may have other goods to weigh against entering a relationship, such as where they live, pursuing an education or career, or having resources for other projects. Moreover, the free love view entails that it is immoral to make a long-term commitment because that might require one to remain in the relationship, at times, for reasons other than spontaneous love. In my view, one cannot be obligated to love, but it is not morally wrong to persist through difficult periods based on a long-term shared project. People seek many goods in love relationships, including companionship, domesticity, reproduction, and so on, and may be willing to subordinate spontaneity and passion to their pursuit.

The correct kernel of the free love opposition to marriage bonds is their problematic imposition of one norm for everyone; as Andrews argued, different modes of association will suit different persons, and so if only one type of marriage is the norm, its constraints will be burdensome for many. But while Andrews questioned the norm of monogamy, he didn’t question the centrality of love and sex to human life—indeed, he opened his unpublished *Love, Marriage, and the Condition of Woman* by asserting its centrality. The free love view, while proposing diversity in relationship structures, is still amatonormative in taking a certain kind of spontaneous, romantic, sexual love as the human goal! Someone who wants to settle down with a good friend for stable companionship, or enter an arranged marriage for reproduction, is simply seeking a different good from the ones that the free lovers prized.

Truly free love (understanding “free” as the free lovers themselves do) requires structures that permit easy exit—freedom to leave is the only way to ensure that staying is free. It also requires social structures that permit relationship diversity, including the choice to opt out of romantic love altogether, in friendships or care networks. A single form of marriage does not simply deny benefits to nonconformists; it also affects what people pursue. Recognizing one relationship in law discourages pursuing other kinds.

Andrews imagined that a society based on free love principles would permit a variety of amorous relations: monogamy, serial monogamy, polygamy. But abandoning amatonormativity might allow individuals to see their sexual relationships differently, not expecting emotional, erotic, intellectual, and leisure companionship all in one sexual partner, but recognizing the value of multiple relationships that carry warmth and affection, mental stimulation, and creaturely companionship. Where marriage and romantic love are not hegemonic, each individual might have a greater chance of discovering what suits her best. Once again, rejecting amatonormativity does not mean prohibiting or discouraging sexual and romantic relationships; it means ceasing to encourage them at the expense of relationship diversity and the marginalization of other caring relationships.

III. RACE

Marriage played a significant role in North American colonialism, racist nation building, and racial slavery and its aftermath. Early settlers condemned Native American family practices, some of which allowed polygamy, divorce, greater gender equality, and same-sex marriage. Settlers, missionaries, educators, and the law imposed an imported European Christian form of marriage on Natives. Family policy was used eugenically; Enakshi Dua writes that North American “projects of nation-building were constituted on a discourse of race, the nuclear family organized gender and sexual relations to ensure a racialized nation.”⁴³ From the beginning of the colonial era until the end of antimiscegenation laws, marriage was used as a eugenic tool and tool of racial subordination, targeted especially at Native Americans, Asian immigrants and Asian-Americans, and African Americans. Racism dictated who had the legal right to marry and who could marry whom, while the imposition of eurocentric marriage law penalized the different practices of Natives, Asian immigrants, and African Americans.

In U.S. slavery, enslaved persons did not have the right to marry. Their informal families were torn apart, their children and partners removed and sold. Slaveholders forced breeding among enslaved persons in order to produce offspring who would themselves be enslaved, and they sexually used and assaulted enslaved females.

After Emancipation and the Civil War, enslaved persons embraced the right to marry as symbolic of civic equality. But a racist discourse sprung up among some chaplains, Freedmen's Bureau workers, and in the press, imputing innate promiscuity to persons of African descent—sometimes on the basis of habits formed as a result of slavery. During this period, formerly enslaved persons were arrested for unmarried cohabitation (which had been widely tolerated among whites up to this point) and other violations of the law of monogamy.⁴⁴

Antimiscegenation law proliferated after the Civil War, once African Americans had gained the right to marry. The law did not so much prevent actual miscegenation as it excluded women of color and their children from the benefits of marriage, including social legitimacy. An exchange in George Washington Cable's 1879 story, "Madame Delphine," illustrates this. Madame Delphine, a "quadroon" with an "octoroon" daughter, asks her priest why inter-racial marriage is prohibited. The priest responds: "To keep the two races separate." The "quadroon" mistress of a white man responds "They do not want to keep us separated! They want to keep us despised. . . . from which race do they want to keep my daughter separate? She is seven parts white! The law did not stop her from being that; and now, when she wants to be a white man's good and honest wife, shall that law stop her?"⁴⁵ Antimiscegenation law helped maintain the fiction of racial difference and hierarchy by creating artificial divisions between socially defined races.

A specious argument used to defend antimiscegenation law was that both African Americans and whites were treated equally in both being forbidden to marry members of the other race. Of course, the law was grounded in beliefs about racial inferiority—the worry that intermarriage would sully the "purity" of the white race—and it served white privilege. It did not truly treat African Americans and whites equally, either symbolically, or, in many cases, materially. Antimiscegenation law also prohibited marriages between whites and Asians, largely in western states where anti-Asian sentiment was virulent.

This legacy still affects race relations and racial inequality. The symbolism of segregating marriage has been a powerful tool of racism. While laws prohibiting interracial marriage were struck down in 1967 by the U.S. Supreme Court in *Loving v. Virginia*, many state governments ignored the decision, and some judges sporadically enforced unconstitutional laws, remaining in state law, against interracial marriage. The state constitutions of Alabama and South Carolina contained such laws until 2000 and 1998, respectively. In a 2000 referendum, Alabama voters repealed the state's unconstitutional ban on interracial marriage—60 to 40 percent. But statistical analysis of voting demographics suggests that roughly half of white Alabama voters opposed repealing the ban.⁴⁶ Disapproval of interracial marriage reportedly continued at "around 30 percent" of Americans in the early 2000s.⁴⁷

These astounding statistics point to the importance some Americans still invest in segregating marriage. Marriage bans play an important symbolic role in maintaining views of racial difference and hierarchy. Patricia Hill Collins has argued that marriage is associated with racism in more subtle ways. For instance, she argues, the American “imagined traditional family ideal” is racialized, as when the “typical family” is presented as white. Furthermore, the gender-structured male-headed family teaches hierarchy, a hierarchy sometimes used to “justify” racial inequality by analogy, as, for instance, when African American adults are portrayed as childlike (a discourse drawn on in justifying slavery, in which enslaved persons were compared with children, or naturally obedient and dependent wives). The ideal of biological kinship legitimated through marriage also lends support to ideas of belonging based on bloodlines and racial purity.⁴⁸

The nineteenth- and twentieth-century U.S. construction of marriage law repudiated non-Christian practices, often in explicitly racist and ethnocentric terms. In public political discourse, polygamy was associated with Muslims, Jews, and Asians. Japanese and Korean “picture marriage” or “proxy marriage” was treated as invalid (in which a woman married a “proxy” in Japan, before traveling to the United States to meet her actual husband), and arranged marriage, which was associated with Asians, came under suspicion. Nonwhites were stigmatized as failing to conform to monogamous marriage, while marriage practices of some nonwhites were not only not recognized, but criminalized. The connection between monogamous Christian marriage and citizenship was so tight that at different times both marrying a prostitute and polygamy were suggested as grounds for stripping male citizens of citizenship.⁴⁹ Marriage law continues to be ethnocentric, enshrining an ideal handed down from European Christians, spread around the world by nineteenth-century missionaries, and built, in the United States, on the extermination or criminalization of Native American marriage practices, as well as, for that matter, nonconforming practices of immigrants or persons brought from Africa.⁵⁰

The legacies of slavery and antimiscegenation law, and other effects of systemic racism, such as race-based poverty and unemployment, low wages, and high rates of incarceration of African American men, continue to shape African American marriage patterns. These patterns provide a good example of how marriage law and policy continue to treat as illegitimate practices associated with nonwhites. Like the Reconstruction officials who criticized the practices of former enslaved persons, state officials have continued to draw moralistic attention to African American marriage patterns. The infamous 1965 U.S. Moynihan Report criticized “Negro” families as too matriarchal, citing reversed gender roles within marriage as well as absent fathers. However, while some of the causes of these patterns are deplorable, the fact that families are female-headed is not in itself cause for negative evaluation.

In African American communities, practices of shared child rearing have proliferated. According to Collins, African American families have traditionally shared child rearing, reflecting “a continuation of West African cultural values” as well as “functional adaptations to race and gender oppression”: “African and African American communities have . . . recognized that vesting one person with full responsibility for mothering a child may not be possible or wise. As a result, othermothers—women who assist bloodmothers by sharing mothering responsibilities—traditionally have been central to the institution of Black motherhood.”⁵¹ Othermothering builds networks of relationships between women of different generations. bell hooks argues that such “revolutionary parenting” represents a feminist ideal possible precluded, in the mainstream, by parental possessiveness.⁵² If researchers and government agencies did not assume such practices to be defective, they would be able to recognize the successes of African American families—including single-parent families and othermothering—where they have occurred and understand better how to support these care networks.

Contemporary marriage law recognizes and benefits a eurocentric form of marriage that is less prevalent among African Americans than among white Americans. Benefitting this form of marriage therefore disproportionately benefits whites and excludes from benefits relationships more prevalent among African Americans. The U.S. government has responded to these patterns by encouraging African Americans to marry. But this overlooks the reasons for different marriage patterns and for poverty, failing to address root causes of poverty in systemic racism.⁵³ Moreover, it fails to recognize the success of alternative family structures such as othermothering. This critique is structurally parallel to Card’s and Ettelbrick’s critique of same-sex marriage—rather than recognizing different, but valuable, African American family patterns, the state has tried to encourage African Americans to enter the only form of marriage available.

This pattern continues today. The U.S. Healthy Marriage Initiative, which carries out marriage promotion, is racially targeted: There is an African American Healthy Marriage Initiative (AAHMI), Hispanic Healthy Marriage Initiative (HHMI), and Native American Healthy Marriage Initiative (NAHMI). The AAHMI claims to respond to “Crisis-level statistics” among African Americans: for instance, “42 percent of African American adults are married, compared to 61 percent of whites & 59 percent of Hispanics,” and “68 percent of AA [*sic*] births are to unmarried women, compared to 29 percent for whites and 44 percent for Hispanics.”⁵⁴ The relational presentation of these numbers is striking. African Americans have *lower* marriage rates and *higher* rates of out-of-wedlock pregnancy. In the statistics presented in this AAHMI Fact Sheet, the highest where high is seen as desirable, the lowest where low is seen as desirable (excepting divorce) is attached to whites.

The evidence that African Americans are in crisis is that their marriage rate is lower than that of whites. White rates are taken as normative.⁵⁵ (That white is also taken as normal is reflected in the fact that there is AAHMI, HHMI, and NAHMI, but no WHMI. The generic HMI is presumably for whites.) The AAHMI itself admits a problem with its racially targeted mission: The bulk of studies showing “the benefits of marriage have been conducted on white marriages rather than black marriages.”⁵⁶ This suggests that the AAHMI rests on the assumption that correlation between marriage and benefits among whites will also hold for African Americans, who face racial discrimination and the complicated legacy of such discrimination.

Moreover, this taxonomy seems arbitrary in choosing race as the relevant category. A marriage map of the United States shows higher marriage rates in the South. Instead of being targeted racially, the HMIs could target Northerners, urbanites, or atheists. The choice to racially segregate the HMIs also assumes that marriages will be intraracial, not interracial; the taxonomy precludes a focus on interracial marriages. Choosing a racial taxonomy is also significant because marriage promotion has moralistic overtones. For example, George W. Bush, who founded the HMI, referred in a State of the Union address to the “moral tradition that defines marriage.”⁵⁷ The Social Security Act criteria for abstinence-only education present marriage as the norm, the appropriate context for sexual activity. By its very rationale in this Act, the HMI implies that those with lower marriage rates have not lived up to society’s norms, so the choice to present data on racial lines may encourage racist stereotypes.

As noted, this critique of marriage law as racially biased parallels the critique of it as heteronormative; the two critiques also intersect. Sarah Lucia Hoagland has argued that heterosexism and white supremacy are mutually reinforcing, that race and gender are constructed mutually in interlocking systems of oppression. For example, the sexuality of white women and women of color is portrayed oppositionally, so that the hierarchies among relationships that marriage defines also underlie racial hierarchies.⁵⁸ While this analysis may explain many social phenomena, it is not necessary to make the case that marriage reform is a matter of racial justice. To make that case, we need only show that different racial and ethnic groups have different marriage rates and different family structures, and marriage law disproportionately and arbitrarily benefits some groups over others in ways that reinforce patterns of discrimination and inequality. Once again, this injustice is not essential to marriage, but can be remedied by restructuring marriage to recognize different practices, so long as they are compatible with justice.

IV. SOCIOECONOMIC CLASS

Contemporary Marxists have updated Marx’s criticism of marriage as an inherently capitalist institution that creates the conditions for private property, including

property in women (which also influenced feminist accounts, discussed above, of marriage as an inherently unjust property relation). The claim is that marriage, as “the maintenance by one man or woman of the effective right to exclude indefinitely all others from erotic access to the conjugal partner,” is “simply a form of private property.”⁵⁹ However, this allegedly inherent injustice, it seems to me, can be eliminated by eliminating legal rights that make marriage akin to property. In practice, marriage need not be sexually exclusive—or dyadic.

But by supporting private property, marriage is said to underlie socioeconomic class stratification. Marriage, one Marxist argues, is “indispensable to the persistence of the capitalist order,” ideologically and in numerous psychological and material ways.⁶⁰ Most notable is the claim that marriage supports the idea that the basic relationship between persons and need-satisfying things (including other persons) is ownership. But marriage, it is claimed, also supports capitalism by separating families as economic units, regulating inheritance, encouraging expenditures on weddings and single-family homes, and keeping divorce lawyers employed. Since the version of egalitarian liberalism I will be employing in later chapters is compatible with capitalism, I won’t address these concerns about capitalism.

However, exclusive, dyadic marriage may well, as Plato argued, orientate resources to private goods rather than to the public good, and, as Fineman argued, away from collective responsibility for dependency.⁶¹ Moreover, it has been argued that marriage is a tool by which employers control the proletariat. In *Against Love*, Laura Kipnis argues that marriages, with their inevitable compromises, quenchings of desire, and hard work, create a docile, cowed, workforce and electorate, who are habituated to settle for less than they want. She writes that marriages are “domestic gulags”: “[W]hat current social institution is more enclosed than modern domesticity? What offers greater regulation of movement and time, or more precise surveillance of body and thought?”⁶² On this noteworthy, though difficult to assess, view, marriage is a social control mechanism habituating spouses to accept authority and sacrifice their desires.

Setting aside these ideas as beyond the scope of this project, there are straightforwardly documented connections between marriage and socioeconomic class. Census data show a socioeconomic gap between the married and unmarried. One reason may be that men, who previously tended to “marry down,” now tend to marry their peers in education and employment. Working-class women wait longer to marry; one possible explanation is that they envision that their pay will plateau once they have a child and so postpone marriage (and child bearing). Another possible explanation is that people wait to marry until they are financially stable.⁶³ These trends suggest that marriage consolidates capital, matching spouses economically and thereby entrenching inequalities. Presumably these effects will be compounded in the next generation,

especially where college educations are expensive. Moreover, it means the benefits attached to marriage are disproportionately benefiting those already better off.

If marriage markets are entrenching economic inequality and eroding equal opportunity, this suggests a conflict with principles of justice. In *A Theory of Justice*, Rawls mentioned the possibility that equal opportunity might require abolishing the family to give children equal starts in life, but dismissed it; however, different family backgrounds do affect children's life chances. Rawls's critic Robert Nozick attempted a *reductio* of economic redistribution by imagining a society in which a central agency distributed mates.⁶⁴ However, unjust consequences of marriage, such as stratification of wealth and reductions in equal opportunity, could be corrected without arranging marriages, for instance, through inheritance tax and education.

Another explanation of the socioeconomic marriage gap is that impediments to marriage and intimate relationships are a hidden cost of poverty, homelessness, or unemployment. The unattainable luxury for the worst-off members of society is not the expensive destination wedding, but the stability, privacy, and heated room of one's own that marriage—or cohabitation, or intimate companionship—requires. Marriage is a less likely prospect for those living with their parents, in a motel or shared room, or where both parties have insecure employment.⁶⁵ Cohabitation is only an economy of scale for those who can afford to live alone in the first place, and thereby save by sharing the costs of housing. Poverty may also undermine marriages: Financial stress causes marital problems.⁶⁶ While I have argued against the amatonormative assumption that everyone wants such relationships, it is also an injustice that the poor should face impediments to relationships and marriage; this too conflicts with ensuring a range of relationship options. However, this also suggests that poverty is not best addressed by marriage promotion.

In the first half of this chapter, I argued that two important elements of marriage law reform are that it recognize relationship diversity and provide good exit options. This will be the subject of a proposal developed in Chapters 7 and 8. One further lesson of this chapter has been that current marriage law has been constructed by arbitrarily (from the perspective of justice) excluding competing forms of marriage. Contemporary marriage law in any particular jurisdiction is only one facet of this multiform institution. In considering reform, it is worth remembering how diverse forms of marriage are, and how greatly marriage law has been constructed, and reconstructed, by legislative fiat. To begin the political argument for reform, I will examine, in Chapter 6, how political liberal arguments for same-sex marriage have had hidden amatonormative assumptions.